U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIE NIWORE and U.S. POSTAL SERVICE,
POST OFFICE, Trenton, NJ

Docket No. 99-2280; Submitted on the Record;
Issued October 11, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issue is whether appellant has more than a four percent permanent impairment of her right upper extremity for which she received a schedule award.

On March 13, 1991 appellant, then a 34-year-old postal clerk, filed a claim for traumatic injury alleging that she injured her thumb while in the performance of duty. The Office of Workers' Compensation Programs accepted her claim on April 25, 1991 for sprained finger, right hand and carpal tunnel syndrome. On September 29, 1992 the Office approved surgery for appellant's right hand.[1] Surgery was performed on November 23, 1992.

Appellant subsequently filed a claim for a schedule award.[2]

In a medical report dated October 19, 1993, Dr. David Weiss, appellant's treating osteopath, stated that appellant had a 55 percent permanent impairment of her right upper extremity. In a medical report dated December 30, 1994, Dr. Weiss noted that he relied on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993)[3] and found a 43 percent permanent impairment of the right upper extremity.

[1] The record reveals two claim numbers representing disability claims for the hand which were not determined to be work related.

[2] The Board notes that the date of appellant's claim for schedule award is August 31, 1997. However, the record contains several references including a letter from her attorney dated December 1, 1993 referring to a pending schedule award claim. The Office addressed appellant's medical evidence in regard to her schedule award on November 21, 1994 noting that no claim form, CA-7, had yet been filed.

[3] Although Dr. Weiss did not specify which edition of the A.M.A., *Guides* he used, his references correspond to the fourth edition.

On September 19, 1995 the Office referred the case to Dr. Irwin A. Moskowitz, a second opinion physician and Board-certified in orthopedic surgery. On October 23, 1995 Dr. Moskowitz stated that appellant had a 10 percent permanent impairment of the right upper extremity. On January 16, 1996 he stated that nerve conduction studies conducted on December 29, 1995 revealed "no further evidence of carpal tunnel syndrome," but that appellant "most likely has signs suggestive of a right sided C6-7 cervical radiculopathy" and recommended a further evaluation by a neurologist or neurosurgeon to assess additional treatment. Dr. Moskowitz added: "She certainly does not require further carpal tunnel surgical release."

In a medical report dated March 1, 1996, the Office medical adviser determined that appellant had a 0 percent permanent impairment of the right upper extremity. He added that "carpal tunnel syndrome is the only accepted condition."

By decision dated May 22, 1996, the Office denied appellant's claim on the grounds that the medical evidence was insufficient to establish that appellant was entitled to a schedule award.

Appellant then requested an oral hearing. A hearing was held on December 11, 1996, and the hearing representative issued a decision on March 3, 1997, finalized that day, in which he found a conflict in medical opinion, vacated and remanded the Office's May 22, 1996 decision and ordered a referral to a "third physician to examine the claimant and provide an opinion on the amount of residual impairment the claimant suffers." The hearing representative noted that the examining physician should "comment on the causal relationship of the residual sensory deficit."

In a report dated May 22, 1997, the employing establishment noted that appellant returned to a light-duty assignment from March 13, 1991 to November 23, 1992, that she had a carpal tunnel release on November 23, 1992, that she was out of work from November 23 to December 13, 1992 and returned to work until March 11, 1997. Appellant stopped work due to a stress condition unrelated to the current appeal.

By letter dated June 11, 1997, the Office referred appellant to Dr. Alexander Fasulo, Board-certified in orthopedic surgery, for an impartial medical examination to resolve the conflict in the medical opinion evidence between the opinions of Drs. Weiss and Moskowitz.

In a medical report dated July 1, 1997, Dr. Fasulo stated that appellant had a four percent permanent impairment of the right upper extremity. He noted he had relied on the third edition of the A.M.A., *Guides*.

In a supplemental medical report dated July 15, 1997, Dr. Fasulo relied on the fourth edition of the A.M.A., *Guides* and determined that appellant had a four percent permanent impairment of the right upper extremity. Annotated to his report was a July 21, 1997 note from

the Office medical adviser which read: "Via [tele]phone, Dr. Fasulo, 10:35 a.m. invalidate index finger from schedule award calculation."[4]

In a medical report dated July 21, 1997, the Office medical adviser reviewed the range of motion data from Dr. Fasulo and determined that appellant had a three percent permanent impairment of the right upper extremity.

By decision dated October 28, 1997, the Office awarded appellant a three percent permanent impairment of her right upper extremity.

On November 4, 1997 appellant requested an oral hearing.

By decision dated April 8, 1998, the hearing representative vacated and remanded the case to the Office for further development. On remand Dr. Fasulo was requested to clarify his comment regarding the invalidation of the index finger evaluation noted on his July 15, 1997 medical report.[5]

By letter dated May 4, 1998,[6] Dr. Fasulo stated that he had agreed with the recommendation of the Office medical adviser to eliminate the evaluation of the second carpometacarpal joint "because the overall value of the hand impairment was not changing in (accordance with) the A.M.A., *Guides,* fourth edition, page 18, Table 1 and page 20, Table 3." He added: "The use of the term 'invalidated' was not mine."

By decision dated July 14, 1998, the Office awarded appellant a three percent permanent impairment of her right upper extremity.

By letter dated July 17, 1998, appellant requested an oral hearing. A hearing was held on February 23, 1999 and on May 3, 1999 the hearing representative issued a decision finalized on May 4, 1999 awarding appellant a four percent permanent impairment of her right upper extremity. The hearing representative found that Dr. Fasulo's initial medical report finding a four percent permanent impairment was sufficient to resolve the conflict in medical opinion and modified the Office's July 14, 1998 decision to find a four percent permanent impairment of appellant's right upper extremity.

In a decision dated June 10, 1999, the Office awarded appellant a one percent increase to her three percent permanent impairment of the right upper extremity.

The Board finds that the case is not in posture for a decision due to an unresolved conflict in the medical opinion.

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[4] The Board notes that the annotated record was a photocopy of Dr. Fasulo's original report. The original report is in the record as well.

[5] By letter dated April 24, 1998, appellant's representative notified the Office that appellant wished to participate in the selection of the impartial medical examiner pursuant to the hearing representative's remand decision. It is noted that the decision did not require the selection of a new impartial medical examiner.

[6] The letter is incorrectly dated 1997.

The Board notes that the July 15, 1997 report from the impartial medical examiner as annotated on July 21, 1997 by the Office medical adviser and relied on by the Office in its October 28, 1997 decision, was improperly obtained and must be excluded from the record. The July 15, 1997 report was amended on July 21, 1997 in response to a conversation between the Office medical adviser and Dr. Fasulo. In his May 4, 1998 supplemental report, Dr. Fasulo noted that he "agreed with (the Office medical adviser) to eliminate (the index finger evaluation)," because the overall rating of appellant's right upper extremity would not be changed.

In *Carlton Owens*,[7] the Board held that oral communications or conversations between the Office and the impartial medical examiner on disputed issues should not occur, as it undermines the appearance of impartiality that is crucial to a referee opinion. In *Edward E. Wright*,[8] the Board applied the principles in *Owens* to a situation where the communication was with the physician's office personnel.[9] Similarly, in *George A. Johnson*,[10] the Board found that a telephone conversation between an Office claims examiner and an impartial medical examiner's office regarding the disputed issue raised an appearance of impropriety such that this report was considered to be improperly obtained. The Board directed that the report in question in *Johnson* be excluded from the record.

The Board finds that the Office medical adviser's conversation with Dr. Fasulo after Dr. Fasulo's July 15, 1997 medical report raises an appearance of impropriety because disputed issues were discussed. Specifically, the Office medical adviser attempted to have the doctor eliminate his evaluation of appellant's index finger, which was part of appellant's claim for a schedule award. As the issue in this case is whether appellant had a permanent impairment of her right upper extremity, a discussion concerning it involves a disputed issue.

Consequently, the medical report dated July 15, 1997 and annotated on July 21, 1997 was improperly obtained and must be excluded from the case record.[11] Because the conflict in medical opinion remains, the Office should refer appellant to an appropriate impartial medical examiner not previously associated with this case for resolution of the conflict of the issue of appellant's entitlement to a schedule award. After such further development as is necessary, the Office shall issue a *de novo* decision.

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[7] 36 ECAB 608, 616 (1985).

[8] 41 ECAB 1017 (1990).

[9] The Office's procedures direct: "If clarification or additional information is needed, the claims examiner will write to the specialist to obtain it. Under no circumstances ... should the [claims examiner] telephone the specialist for elaboration of the report as information obtained ... cannot be considered probative medical evidence and bias may be inferred as a result." Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examination*, 3.500.5(b)(2) (October 1995). These procedures also require the exclusion of an impartial medical examiner's report where the report "is obtained through telephone contact or submitted as a result of such contact." *Id.* at 3.500.6(c).

[10] 43 ECAB 712 (1992).

[11] *Id.*; *see Terrance R. Stath*, 45 ECAB 412 (1994) (regarding situations when a report of a designated impartial medical specialist must be excluded from the record).

The May 3, 1999 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, DC
October 11, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member